

STATE OF WISCONSIN
SUPREME COURT
2008AP919

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OF WISCONSIN**

JAMES ZARDER, GLORY ZARDER, and
ZACHARY ZARDER, by Robert C. Menard,
Guardian Ad Litem,

Appeal No. 2008AP919

Plaintiffs-Respondents,

v.

Cir. Ct. Case No. 07 CV 1146

HUMANA INSURANCE COMPANY,
Defendant,

ACUITY, A MUTUAL INSURANCE COMPANY,
Defendant-Appellant-Petitioner.

Review of a February 18, 2009 Decision of the Wisconsin Court of Appeals,
District II, Affirming an Order of the Circuit Court for Waukesha County, the
Honorable Kathryn W. Foster Presiding

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INTRODUCTION

The issue in this case is whether Zachary Zarder is entitled to Uninsured Motorist (UM) benefits under the terms of Acuity's insurance policy and/or the omnibus insurance statute. Zachary was struck by an unidentified motor vehicle while riding his bike. The driver of the vehicle briefly stopped and then fled the scene without providing identifying information. This Court must decide whether such an unidentified motor vehicle constitutes a "hit-and-run" vehicle.

The Wisconsin Association For Justice ("WAFJ") respectfully submits that the phrase "hit-and-run" vehicle can reasonably be read—and should be read—to include an unidentified vehicle that strikes an insured, whose operator is unknown, and who flees the scene of an accident without providing identifying information. No Wisconsin case or statute limits the definition of "hit-and-run" to an accident involving an unidentified vehicle that "immediately flees" the scene of an accident. Such a result would be contrary to the purpose of "hit-and-run" UM insurance—to provide the victim of an accident compensation where the tortfeasor driver cannot be identified. This result is supported by the common, ordinary meaning of

the term “hit-and-run,” as well as its use in Wisconsin’s omnibus insurance statute, and the requirements of Wisconsin’s criminal “hit-and-run” statute.

Hayne v. Progressive Northern Insurance Co., 115 Wis. 2d 68, 339 N.W.2d 588 (1983), is not dispositive because, although the Court equated “running” with “fleeing,” the Court never defined the term “flee” and never addressed *when* a “flee” must occur. “Flee,” can mean either leaving an area with haste or leaving an area when required by law to stay. Because Wisconsin law requires a motorist to stay at a scene of an accident and furnish identifying information to the injured driver, “fleeing” is properly interpreted as leaving a scene without providing such information.

Therefore, WAJ respectfully requests that this Court hold that an unidentified vehicle whose operator fails to provide identifying information before leaving the scene of an accident constitutes a “hit-and-run” vehicle within the meaning of Acuity’s policy and Wis. Stat. § 632.32(4)(a)2.b¹—regardless of whether and how long the driver may “stop” at the scene.

BACKGROUND

Zachary Zarder was seriously hurt after being struck by an unidentified vehicle while riding his bicycle. The occupants of the

¹ All references to Wisconsin Statutes are to the 2007-08 version, unless otherwise indicated.

unidentified vehicle fled the scene without providing any identifying information after briefly stopping to inquire as to Zachary's well-being. Zarder v. Humana Ins. Co., 2009 WI App 34, ¶¶ 2-4, 316 Wis. 2d 573, 765 N.W.2d 839. Zachary's parents made a claim for UM benefits under their policy with Acuity. The policy states that an "uninsured motor vehicle" includes "a hit and run vehicle whose operator or owner is unknown." "Hit and run" is not defined. Acuity denied coverage because the unidentified driver briefly stopped before leaving the scene of the accident. Id., ¶¶ 5-6.

ARGUMENT

I. **THE TERM "HIT-AND-RUN" IN ACUITY'S POLICY IS NOT LIMITED TO A VEHICLE THAT IMMEDIATELY FLEES THE SCENE OF AN ACCIDENT.**

Acuity argues the term "hit-and-run vehicle" in its policy means a vehicle that immediately flees the scene of an accident without ever stopping. There is nothing in the text of its policy, Wisconsin case law, or Wisconsin statutes that support this restricted definition of the phrase. Rather, the term "hit-and-run vehicle" can be reasonably interpreted to include a vehicle operated by a driver that temporarily stops at the scene of the accident but then flees without providing any identifying information.

A. The Term “Hit-and-Run Vehicle” Can Reasonably Be Interpreted to Mean a Motor Vehicle Whose Operator Flees The Scene of an Accident Without Identifying Himself.

Because the phrase “hit-and-run vehicle” is undefined in Acuity’s policy, this Court must apply the common, ordinary meaning of that phrase as understood by a reasonable insured. See State Farm Mut. Auto. Ins. Co. v. Rechek, 125 Wis. 2d 7, 10, 370 N.W.2d 787 (Ct. App. 1985). To this end, “the test is not what the insurer intended its words to mean but what a reasonable person in the position of an insured would have understood the words to mean.” McPhee v. Am. Motorists Ins. Co., 57 Wis. 2d 669, 676, 205 N.W.2d 152 (1973).

If there are two competing reasonable interpretations of a word or phrase, the policy is ambiguous. “Whatever ambiguity exists in a contract of insurance is resolved in favor of the insured.” Caporali v. Washington National Insurance Co., 102 Wis. 2d 669, 666, 307 N.W.2d 218, 221 (1981).

Zarder and General Casualty have presented this Court with a series of foreign cases that take differing approaches as to whether the term “run” requires fleeing after an accident without stopping or fleeing after an accident without providing identifying information. Clearly, there is a split

of judicial authority on the issue and reasonable courts have reached different conclusions. As the New Hampshire Supreme Court astutely noted in Wilson v. Progressive Northern Insurance Company, 868 A.2d 268, 274 (N.H. Sup. Ct. 2005): “First, a hit-and-run vehicle can be construed as a vehicle that does not stop at the scene of an accident. . . . Alternatively, a vehicle that stops at the scene of the accident but then leaves before the driver provides identifying information may also be considered a hit-and-run vehicle.”

Notably, the Court in Hayne recognized that the phrases “hit-and-run” and “hit-and-run driver” have several definitions, including:

- a person “guilty of leaving the scene of an accident without stopping . . . to comply with legal requirements”;
- “one that hits and runs away; esp. a hit-and-run driver”;
- “the driver of a vehicle who illegally continues on his way after hitting a pedestrian or other vehicle.”

Hayne, 115 Wis. 2d at 73 (emphasis added).

As discussed below, Wisconsin’s “legal requirements” under these circumstances include both stopping at the scene and furnishing several pieces of identifying information to the injured person. Therefore, as applied to the facts of this case, the term “hit-and-run” in Acuity’s policy is

reasonably susceptible to more than one meaning, and, as such, is ambiguous, and must be construed in favor of coverage.

B. No Wisconsin Case Requires a “Hit-and-Run” Vehicle to “Immediately Flee” the Scene of an Accident.

Contrary to Acuity’s assertions, no Wisconsin case holds that the term “hit-and-run” requires the immediate flight of an unidentified vehicle from the scene of an accident in order for there to be a “run.” Other than the Court of Appeals opinion below, no Wisconsin case has even addressed the issue. Instead, Wisconsin courts have consistently used the word “run” in a general sense of leaving the scene of an accident—without describing *when* the run must occur. Smith v. Gen. Cas. Ins. Co., 2000 WI 127, ¶ 10, 239 Wis. 2d 646, 619 N.W.2d 882.

1. Hayne is not dispositive because the Court never defined the word “flee” and never addressed at what point “fleeing” must occur.

The parties spend a significant amount of time discussing whether the language in Hayne that refers to “fleeing” is dicta. WAJ respectfully submits that this misses the point. Regardless of whether Hayne’s “fleeing” language is binding or not, the fact remains that neither Hayne nor any other decision in Wisconsin sets forth the point in time at which a vehicle must “flee” to be considered a “hit-and-run vehicle.”

The admitted “sole issue” in Hayne was whether the word “hit” in the phrase “hit-and-run” requires physical contact between two vehicles. Hayne, 115 Wis. 2d at 69. Hayne discussed several definitions of the phrase “hit-and-run” and determined all definitions had two components: “a ‘hit’ or striking, and a ‘run’, or fleeing from the scene of the accident.” Id. at 73-74.

The Court in Hayne did not elaborate as to what “fleeing” means or address *when* a vehicle must flee in order to be a “hit-and-run vehicle.” The Court did not consider whether “fleeing” means leaving the scene of an accident immediately or leaving the scene of an accident without providing identifying information. Hayne had no reason to do so, as the only issue it addressed was whether the phrase “hit-and-run vehicle” contained a physical contact requirement. Hayne’s discussion of “run” and “fleeing” was merely incidental to its analysis of the meaning of “hit.”

Thus, even acknowledging that Hayne equated the word “run” with “fleeing,” Hayne does not resolve this case.

2. The word “flee” itself has multiple definitions and is ambiguous as applied to the facts of the present case.

Just as the word “run” can have multiple meanings when used in the phrase “hit-and-run,” the dictionary definition of “flee” reveals that it can

be understood in two different fashions: “1. To run away, as from trouble or danger. 2. To pass swiftly away.” The American Heritage College Dictionary at 529 (4th Ed. 2004). These definitions of the word “flee” mirror the dictionary definitions the Hayne court noted for the term “run.” See Hayne, 115 Wis. 2d at 73. Both can be understood to mean leaving a place to avoid “legal requirements” and “trouble,” or to leave a place “swiftly,” “without stopping.”

Indeed, people commonly use the word “flee” to refer both to the act of leaving an area quickly and to the act of leaving an area under circumstances where the person is required to remain there by law. For instance, people commonly refer to a criminal “fleeing the scene of a crime.” However, a person can “flee” even if he has momentarily “stopped.” No one can reasonably argue that a driver who pulls over to the side of the road after being chased by a police car but then speeds away after the officer exits the vehicle did not “flee” the scene—notwithstanding the momentary stop.

Because the terms “hit-and-run” and “flee” are ambiguous and a reasonable interpretation of both supports the insured’s position, Acuity’s policy should be construed to provide coverage for Zachary.

II. SECTION 632.32(4)(a) SHOULD BE INTERPRETED TO COVER AN ACCIDENT WHERE AN UNKNOWN DRIVER LEAVES THE SCENE WITHOUT PROVIDING IDENTIFYING INFORMATION.

The version of Wisconsin's omnibus insurance statute that was in effect at the time Zachary was hit, § 632.32(4)(a)2.b., required all policies of insurance to include coverage for injuries caused by an "uninsured motor vehicle," which it defined to include "a vehicle involved in a hit-and-run accident." The statute did not define the term "hit-and-run accident" and, like Acuity's policy, it is ambiguous as to whether it applies to the present fact scenario.

Instead, the Wisconsin Legislature left it up to the courts to decide how that phrase should be applied on a case-by-case basis. Theis v. Midwest Sec. Ins. Co., 2000 WI 15, ¶ 28, 232 Wis. 2d 749, 606 N.W.2d 162; Legislative Council Note in § 632.32, ch. 102, Laws of 1979. As such, this Court must examine the scope, context, and purpose of the § 632.32(4)(a)2.b., as well as the language of surrounding statutes to arrive at a reasonable meaning and avoid absurd results. State ex rel. Kalal v. Circuit Court, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

A. The Purpose, Context and Scope of § 632.32(4)(a)2.b Supports Construing “Hit-and-Run Accident” as One Where a Vehicle Leaves the Scene of an Accident Without Providing Identifying Information.

The “primary purpose” of the UM requirement in § 632.32(4)(a) is “to compensate an injured person who is the victim of an uninsured motorist's negligence to the same extent as if the uninsured motorist were insured.” Theis, 232 Wis. 2d 749, ¶ 28. As applied to “hit-and-run” accidents, UM coverage provides an insured compensation when he is unable to identify the tortfeasor-driver and the tortfeasor’s insurer. Smith, 239 Wis. 2d 646, ¶ 26 (The purpose of UM insurance is furthered by providing coverage because “if the vehicle that negligently started the chain reaction collision had been identified and was insured, Smith could have recovered under that policy.”) (emphasis added).

Thus, the purpose of “hit-and-run” UM coverage is frustrated if an injured person is denied compensation simply because the driver of an unknown vehicle momentarily stops after an accident. The important consideration is whether the tortfeasor can be identified, not whether the tortfeasor “stopped” for any given period of time. See id.

Likewise, the context and scope of the statute supports providing compensation to an injured person in these circumstances. The phrase “hit-

and-run accident” in § 632.32(4)(a)2.b. is immediately preceded by the phrase “an unidentified vehicle.” Thus, the focus should be on whether the driver of the vehicle involved in the accident provided identifying information—not whether the driver “ran” or “fled” within some arbitrary period of time. Therefore, an accident involving a driver who “runs” without identifying himself should fall within the definition of “hit-and-run,” even if the driver momentarily stops.

B. The Criminal “Hit-and-Run Statute” Supports Construing “Hit-and-Run Accident” as One Where a Vehicle Leaves the Scene of an Accident Without Providing Identifying Information.

Wisconsin Stat. § 346.67, part of Wisconsin’s “Rules of the Road,” is also helpful in resolving the ambiguity in the definition of “hit-and-run.” This statute creates Wisconsin’s criminal “hit-and-run offense” and sets forth the legal obligations of a Wisconsin motorist upon striking another person or vehicle. State ex rel. McDonald v. Douglas County Circuit Court, 100 Wis. 2d 569, 574, 580, 302 N.W.2d 462 (1981).

The statute requires, inter alia, that the driver “stop . . . at the scene of the accident” and that “[t]he operator . . . give his or her name, address and the registration number of the vehicle he or she is driving to the person struck or to the operator or occupant of or person attending any vehicle

collided with[.]” Wisconsin Stat. § 346.67(1)(a). The statute also requires the driver to identify himself as the operator of the vehicle. Wuteska, 303 Wis. 2d 646, ¶ 13.

Its purpose is to “require the disclosure of information so that responsibility for the accident may be placed.” State v. Wuteska, 2007 WI App 157, ¶ 15, 303 Wis. 2d 646, 735 N.W.2d 574. Violation of the statute is a felony. McDonald, 100 Wis. 2d at 580.

The statute is relevant because the definitions of “hit-and-run” and “flee” mentioned supra refer to a driver “illegally contin[uing] on his way” to “run[] away . . . from trouble,” and who fails to “comply with legal requirements.” Hayne, 115 Wis. 2d at 73 (emphasis added). Section 346.67 sets forth those “legal requirements” in Wisconsin and provides that a driver “illegally continues on his way” if he fails to provide identifying information to the person struck. Because the driver who struck Zachary failed to provide identifying information before fleeing, Zachary’s accident was a “hit-and-run accident.”

C. The Policy Embodied in the Recent Changes to Wis. Stat. § 632.32 Support the Court of Appeals’ Decision.

Although not in effect at the time of Zachary’s accident, the recent amendments to the omnibus insurance statute are relevant in that they are

an indication of Wisconsin's current public policy as to UM coverage. See 2009 Wis. Act. 28, § 3155. While newly enacted Wis. Stat. § 632.32(2)(g) does not define "hit-and-run accident," it does expand the definition of "uninsured motor vehicle" to include "an unidentified motor vehicle, provided that an independent 3rd party provides evidence in support of the unidentified motor vehicle's involvement in the accident." Wis. Stat. § 632.32(2)(g)2.²

Thus, the new statute includes an unidentified "miss-and-run" vehicle within the definition of "uninsured motor vehicle." This addition supports the notion that the focus of term "hit-and-run" should be on whether the tortfeasor-driver is unidentified—not how quickly the motorist fled. Indeed, it would be quite odd if § 632.32(2)(g)2. were interpreted to require UM coverage when an unidentified vehicle never makes contact with an insured vehicle but not to require coverage where an unidentified vehicle actually hits the insured vehicle but momentarily stops before fleeing.

² It is undisputed that Zachary's accident was witnessed by third parties who observed the occupants of the unidentified vehicle briefly stop and then flee the scene.

D. It is Unreasonable to Deny UM Coverage Based on Unidentified Driver's Felonious Behavior.

Under Acuity's position, a vehicle involved in an accident whose driver pauses momentarily, rolls down the window, and yells out "are you ok" to the victim before leaving would not be a "hit-and-run" vehicle. Likewise, a vehicle in an accident that spins out and comes to a complete stop for any period of time before speeding off would not be a "hit-and-run" vehicle. Despite the fact that such behavior would violate the criminal hit-and-run statute, Acuity would have the Court rule that these are not "hit-and-run accidents" under § 632.32(4)(a)2.b.

Momentarily stopping at the scene of an accident, whether for two seconds or two minutes, does no one any good if the driver never identifies himself to the victim so that insurance coverage can be determined. As noted, the purpose of the felony "hit-and-run" statute is "to require the disclosure of information so that responsibility for the accident may be placed." Wuteska, 303 Wis. 2d 646, ¶ 15. Likewise, the purpose of mandatory hit-and-run UM coverage is to provide a victim with the same amount of coverage he would have if the tortfeasor were identified and had insurance. Smith, 239 Wis. 2d 646, ¶ 26. It is simply absurd, unreasonable, and inherently inequitable to deny UM coverage to the

victim of a hit-and-run accident based on the felonious behavior of a tortfeasor driver who violates § 347.67.

CONCLUSION

Therefore, WAJ respectfully requests that this Court affirm the Court of Appeals' decision and hold that an unidentified vehicle that strikes the insured, whose operator is unknown, and who fails to stop and provide identifying information at the scene of an accident constitutes a "hit-and-run vehicle."

Dated in Madison, Wisconsin this 21st day of January, 2010.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font (Times New Roman 13 pt for body text and 11 pt for quotes and footnotes).

The length of this brief is 2947 words.

ELECTRONIC FILING CERTIFICATION

I further certify, pursuant to Wis. Stat. § 809.19(12)(f) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: January 21, 2010.

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